Huzir bin Hassan v Ketua Polis Daerah, Polis Di-Raja Malaysia, Johore Bahru

HIGH COURT (JOHORE BAHRU) — CRIMINAL APPLICATION NO 44-33 OF 1989
ABU MANSOR J
4 DECEMBER 1989

Criminal Procedure — Uncautioned statement of accused — Application for statement to be furnished to accused — Statement made during detention under Dangerous Drugs (Special Preventive Measures) Act 1985 — Matters of national security and interest — Whether court had discretion in deciding what was against the national interest — Criminal Procedure Code (FMS Cap 6), ss 112 & 113 — Dangerous Drugs (Special Preventive Measures) Act 1985, ss 3, 4, 6 & 14

Evidence — Public document — National interest — Statement recorded while accused detained under Dangerous Drugs (Special Preventive Measures) Act 1985 — Whether the statement may be inspected as a public document — Evidence Act 1950, ss 74 & 76 — Dangerous Drugs (Special Preventive Measures) Act 1985, ss 3, 4, 6 & 14

The applicant applied for an order that the respondent do furnish him with the uncautioned statement made by him to the police during his detention under the Dangerous Drugs (Special Preventive Measures) Act 1985 ('the Act'). The respondent objected to the application.

Held, dismissing the application:

(1) At the time the statement was recorded the police were also conducting an investigation under the Act. The statement was therefore recorded under a special law. The supply of any statement must therefore depend on the provisions of the Act.

(2) Anything that would have the effect of jeopardizing national security ran counter to national interest. Section 14 of the Act prevented the court from requiring the disclosure of any statement or document once a relevant public officer appeared claiming its disclosure ran counter to national interest. The public officer had the last say that the fact or evidence to be produced was against the national interest to disclose or produce.

[Bahasa Malaysia summary

Pemohon memohon untuk satu perintah bahawa responden memberikannya kenyataan tidak beramaran yang dibuat olehnya kepada polis semasa penahanannya di bawah Akta Dadah Berbahaya (Langkah-Langkah Pencegahan Khas) 1985 ('Akta itu'). Responden membantah terhadap permohonan itu.

Diputuskan, menolak permohonan itu:

(1) Pada masa kenyataan itu direkodkan, pihak polis juga sedang menjalankan penyiasatan di bawah Akta itu. Lantaran itu, kenyataan itu direkodkan di bawah undang-undang khas. Pemberian sesuatu kenyataan oleh kerana itu mestilah bergantung kepada peruntukan Akta itu.

(2) Apa-apa yang mempunyai kesan mengancam keselamatan negara adalah bertentangan dengan kepentingan negara. Seksyen 14 Akta itu mencegah mahkamah daripada menghendaki pendedahan sebarang kenyataan atau dokumen sebaik sahaja seorang pegawai awam tampil untuk menuntut bahawa pendedahan itu adalah bertentangan dengan kepentingan negara. Pengawai awam itu mempunyai kata akhir bahawa pendedahan fakta atau keterangan yang akan dikemukakan itu adalah bertentangan dengan kepentingan negara.]

[*Editorial Note:* The applicant's appeal to the Supreme Court vide Criminal Appeal No 05-180-89 was heard on 28 January 1991 and the court (comprising Abdul Hamid Omar LP, Mohamed Azmi and Gunn Chit Tuan SCJJ) allowed the appeal.]

Cases referred to

1 *Khoo Siew Bee & Anor* v *Ketua Polis, Kuala Lumpur* [1979] 2 MLJ 49 (refd)
2 *Haji Abdul Ghani bin Ishak* v *PP* [1980] 2 MLJ 196 (refd)
3 *Husdi* v *PP* [1979] 2 MLJ 304 (folld)
4 *BA Rao & Ors* v *Sapuran Kaur & Anor* [1978] 2 MLJ 146 (distd)

Legislation referred to

Criminal Procedure Code (FMS Cap 6) ss 112, 113
Dangerous Drugs (Special Preventive Measures) Act 1985 ss 3, 4, 6, 14
Evidence Act 1950 ss 74, 76

Teh Poh Teik for the applicant.
Sauffee Afandi (Deputy Public Prosecutor) for the respondent.

Cur Adv Vult

Abu Mansor J: By his notice of motion dated September 1989, the applicant applied for an order that the respondent do furnish the applicant or his solicitors the uncautioned statement(s) made by the applicant to the police during his detention under the Dangerous Drugs (Special Preventive Measures) Act 1985. The respondent through the deputy public prosecutor opposed the application. After hearing arguments, I reserved judgment to a date to be fixed.

Presently the applicant has been charged under s 39B of the Dangerous Drugs Act 1985 and is awaiting trial yet to be fixed. Presumably he makes this present application for the purpose of his coming trial, I think there is no dispute that the applicant had given an uncautioned statement or statements to the police. This the respondent refuses to supply. The only issue before me reduces itself to one and only issue whether the court should make the order applied for.

Mr Teh Poh Teik contended that the applicant is entitled to a copy of his statement whether it is cautioned statement or uncautioned statements since it is a public document and further the applicant has got a tangible interest to the statement as it was his statement to the police. Counsel says the matter is governed by s 74 of the Evidence Act 1950 which says:

> The following documents are public documents:
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> (a) documents forming the acts or records of the acts of
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> (i) the sovereign authority;
> (ii) official bodies and tribunals; and

(iii) public officers, legislative, judicial and executive, whether Federal or State or of any other part of the Commonwealth or of a foreign country; and

(b) public records kept in Malaysia of private documents.

and he contended it is also governed by s 76 of the said Act which provides:

> Every public officer having the custody of a public document which any person has a right to inspect shall give that person on demand a copy of it on payment of the legal fees therefor, together with a certificate, written at the foot of the copy, that it is a true copy of the document or part thereof, as the case may be, and the certificate shall be dated and subscribed by the officer with his name and his official title, and shall be sealed whenever the officer is authorized by law to make use of a seal, and the copies so certified shall be called certified copies.
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> Explanation — Any officer who by the ordinary course of official duty is authorized to deliver the copies shall be deemed to have the custody of the documents within the meaning of this section.

Counsel submitted that s 74 of the Evidence Act 1950 read together with s 76 of that Act allow the applicant to have a copy of his uncautioned statement. As for his authority regarding cautioned statements he urged the court to look at *Khoo Siew Bee & Anor* v *Ketua Polis, Kuala Lumpur*[1] where Suffian LP held that the cautioned statements were public documents and as the applicant has an interest in the cautioned statements recorded he is therefore entitled to a copy of it on payment of a small fee. As for the position as regards uncautioned statements, the applicant's counsel cited *Haji Abdul Ghani bin Ishak* v *PP*[2] where the learned judge held that the statements made by the applicant, whether cautioned or uncautioned, were public documents and since the applicant had tangible interest in them, the applicant was therefore entitled to a copy of the document.

In the face of these authorities the applicant prayed that he be supplied with a copy of his uncautioned statement.

Encik Sauffee, counsel for the respondent in opposing the applicant's application informed the court the applicant had given to the police two statements, one cautioned and the other uncautioned. The applicant had been supplied with a copy of his cautioned statement. The objection is with regard to the supply of his uncautioned statement only.

The reason for the objection by the learned deputy is that the uncautioned statement was taken by the authority under the Dangerous Drugs (Special Preventive Measures) Act 1985. The preamble of that Act reads:

> An Act to provide for the preventive detention of persons associated with any activity relating to or involving the trafficking in dangerous drugs.
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> Whereas action which is prejudicial to public order in Malaysia has been taken and further similar action is being threatened by a substantial body of persons both inside and outside Malaysia;
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> And whereas Parliament considers it necessary to stop such action.

The learned deputy further submitted the importance of such a statement in the fight against the drug menace cannot be overlooked and in that context that uncautioned statement, he submitted, should not be regarded as a public document.

In further opposing the application, the respondent's counsel submitted that the uncautioned statement recorded from the applicant is an 'intelligence' statement and therefore not a public document. The effect of allowing the applicant to have sight of his statement would be the same as if the authority were allowing him to look at special branch files. As authority for his refusal, he cited the case of *Husdi* v *PP*.[3]

The learned deputy further submitted that none of the authorities cited by the applicant's counsel offers any direct solution to the problem posed before us whether the applicant can be supplied with a copy of his uncautioned statement. As has been submitted by the respondent's counsel, the authorities cited related to statements recorded by the police under s 112 and s 113 of the Criminal Procedure Code (FMS Cap 6). Whereas our case is a shade different. Since the uncautioned statement was recorded not under the Criminal Procedure Code but under the Dangerous Drugs (Special Preventive Measures) Act 1985 (Act 316) the respondent's counsel submitted that the court can depart from the authorities cited by the applicant's counsel. Since the uncautioned statement was recorded under the Dangerous Drugs (Special Preventive Measures) Act 1985, the respondent under s 14 thereof can and did claim that it is against national interest to disclose the same.

I think the answer to the applicant's counsel's contention that a copy of the uncautioned statement can be supplied in view of s 74 and read together with s 76 of the Evidence Act 1950 is at p 306 of *Husdi* v *PP*[3] where Syed Othman FJ said:

> On the face of it, a police statement falls under s 74 of the Evidence Act, as it is a document forming the act of a public officer. Simply because a document is the act of a public officer does not give a person, interested or otherwise, a right to inspect. Section 76 of the Evidence Act merely relates to the manner of certification. It is not an enactment which confers any right. It presupposes the existence of the right to inspect. The opening part of the section reads 'Every public officer having the custody of a public document which any person has a right to inspect . . .'. The right to inspect a police statement, which is a statutory, not common law, creature, would depend on the construction of the relevant provisions, particularly those under the Criminal Procedure Code.

Has the applicant the right to inspect this particular uncautioned statement since it was recorded, so says the learned deputy public prosecutor, not under the Criminal Procedure Code but under a different Act?

Now we have the statement of the learned deputy that for the purpose of his trial, the prosecution has supplied to the applicant his cautioned statement. This uncautioned statement he said was recorded under the provisions of the Dangerous Drugs (Special Preventive Measures) Act 1985 and the release of these uncautioned statements would be the same as the authorities releasing documents or statement in special branch files.

From the term of this submission, the court had to take it that there were two investigations simultaneously conducted under the Criminal Procedure Code which resulted eventually in the applicant being charged under s 39B of Dangerous Drugs Act 1952 and the police was also at the same time conducting a separate investigation under the Dangerous Drugs (Special Preventive Measures) Act 1985 under s 3 thereof with a view to submitting a complete report to the enquiry officer and the minister. No one can deny that it is within the police to conduct what type of investigation they wish to do — overt or covert.

As for their investigation under the Dangerous Drugs (Special Preventive Measures) Act 1985, sub-s (3) of s 3 and s 4 read as follows:

> 3(3) The police officer making an investigation pertaining to a person arrested and detained under this section shall cause a copy of the complete report of the investigation to be submitted —
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> (a) to an Inquiry Officer appointed under subsection (1) of section 5; and
> (b) to the Minister,
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> within such period as may be prescribed by the Minister by regulations made under this Act.
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> 4(1) For the purpose of satisfying the Minister that an order under subsection (1) of section 6 should be made and for the purpose of enabling the Minister to furnish a statement under paragraph (b) of subsection (2) of section 9, a police officer making an investigation under this Act may examine orally any person supposed to be acquainted with the facts and circumstances of the case and shall reduce into writing any statement made by the person so examined.
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> (2) Such person shall be bound to answer all questions relating to such case put to him by such officer.
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> (3) A person making a statement under this section shall be legally bound to state the truth, whether or not such statement is made wholly or partly in answer to questions.
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> (4) A police officer examining a person under subsection (1) shall first inform that person of the provisions of subsections (2) and (3).
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> (5) A statement made by any person under subsection (1) shall bear the date and time of making thereof and shall be signed by the person making it or affixed with his thumbprint, as the case may be, after it has been read to him in the language in which it was made and after he has been given an opportunity to make any corrections he may wish.

All these investigations could culminate in the issuance of a detention order by the minister under s 6(1) which reads:

> Whenever the Minister, after considering —
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> (a) the complete report of investigation submitted under subsection (3) of section 3; and
> (b) the report of the Inquiry Officer submitted under subsection (4) of section 5,
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> is satisfied with respect to any person that such person has been or is associated with any activity relating to or involving the trafficking in dangerous drugs, the Minister may, if he is satisfied that it is necessary in the interest of public order that such person be detained, by order (hereinafter referred to as a 'detention order') direct that such person be detained for a period not exceeding two years from the date of such order.

From the above, I am fully satisfied in the applicant's case the police were at the same time conducting an investigation wherein the statements taken were in fact under a special law. As was stated by Syed Othman FJ in *Husdi* v *PP*:[3] 'The right to inspect a police statement which is a statutory, not common law, creature, would depend on the construction of the relevant provisions . . .'. In this case, my firm view is the supply of any recorded statement under this Act must depend on the provisions of the Dangerous Drugs (Special Preventive Measures) Act 1985. Section 14 of the Act reads:

> Nothing in this Part or in any rules or regulations made thereunder shall require the Minister or any member of an Advisory Board or any Inquiry Officer or any public servant to disclose facts or to produce documents which he considers to be against the national interest to disclose or produce.

The learned deputy, in objecting to the supply of the applicant's uncautioned statement, said the disclosure of it would be tantamount to opening up special branch files, thus jeopardizing national security to disclose. I rule that anything done that would have the effect of jeopardizing national security runs counter to national interest. Under this Act, at least, once the public officer who appears for the Ketua Polis Johore Bahru claims such disclosure runs counter to national interest, I think I have to be satisfied at that. I have also not been addressed to by the applicant's counsel that such a statement is reviewable and nowhere does that Act allow me to go further.

It appears to me on a reading of s 14 of the Dangerous Drugs (Special Preventive Measures) Act 1985 the public servant claiming the privilege has the last say that the fact or evidence to be produced is against the national interest to disclose or produce. It would therefore be a departure from the case of *BA Rao & Ors* v *Sapuran Kaur & Anor*[4] (not cited by either side) where the

Federal Court held that the court will have the final say in the task of determining national or public interest rather than the authority claiming the privilege. I have but to lean in favour of the provisions of that Act which in clear terms state that nothing shall require those members or public servant to disclose 'which he considers to be against the national interest to disclose or produce'. I think on such a clear provision the court will have to take a back seat.

Having said all these, I have no alternative but to dismiss the applicant's application to be supplied with a copy of his uncautioned statement. I order accordingly.

Application dismissed.

Solicitors: *Abdul Raman Saad & Associates.*

Reported by *Mathavan Devadas*